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RESTORATION CONSTITUTIONALISM IN THE SOUTH PACIFIC

Venkat Iyer[†]

Abstract: The dilemmas confronting societies which move from a period of authoritarian rule to liberal democracy have increasingly engaged the attention of academic experts and policy-makers alike. One issue which has received comparatively less notice, however, is the phenomenon of “restoration constitutionalism,” i.e. the process by which the transitional society is sought to be returned to the constitutional order that predated the authoritarian rule. Recent events in Fiji offer a good example of how this process works in practice. This article looks at the relationship between constitutionalism and transitional regimes, and argues that, where the “rupture” in a constitutional order is relatively short-lived, restoration constitutionalism provides a smoother and quicker return to liberal politics than any other modality of transition.

I. INTRODUCTION

The closing years of the twentieth century saw an unprecedented number of societies undergoing significant transition of one kind or another, usually from authoritarian rule to liberal democracy. Much of the impetus for this process of change came from the collapse of ideologies such as communism and apartheid which had held sway over governments in many parts of the world for a generation or more.¹ This period also saw in several countries the end of repressive regimes of a non-ideological character.² In some cases, this was a result of the withdrawal from their territories of outside powers which had either been occupying them or exercising *de facto* control over their running.³ The end of the twentieth century was marked, too, by the emergence of “peace processes” in a number of societies whose populations had been riven by long-running ethnic, religious or other strife.⁴ Less welcomingly, the period also witnessed some transitions of an illiberal character: from relatively stable and peaceful democracies to military dictatorships or other regimes antithetical to freedom and democracy, often following coups or other illegal seizures of power.⁵

These transitions varied widely in scale, sweep and speed; some led to dramatic transformations in the political landscapes of the countries

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¹ The obvious examples in this category being, respectively, the republics of the former Soviet Union and its client states in Central and Eastern Europe, and South Africa.

² The 1998 fall of Suharto’s military regime in Indonesia is an example of this.

³ Indonesia’s withdrawal from East Timor provides an example.

⁴ E.g., Northern Ireland, Sri Lanka, Bosnia and Herzegovina.

⁵ E.g., Burma.

concerned, while others proved to be less impressive in their results.⁶ Unsurprisingly, the phenomenon itself has attracted considerable academic attention, spawning both a body of literature which has grown exponentially in recent years⁷ and a discrete discipline of study that is encompassed within the broad title of “transitional justice.”⁸

The predominant concern of transitional justice studies has, understandably, been to find ways and means of dealing with the maleficent legacies of a repressive society’s past as it grapples with the challenges of building a new liberal future. As such, much attention has been focused in the published literature on measures and processes—such as truth commissions, reparations, lustration, punishment and compensation schemes—which help achieve that objective. The role of law—including constitutional law—in managing transitions has figured prominently in the literature: a role which, arguably, is as important as it is wide-ranging.

One contribution that constitutional law might be able to offer in transitional situations has received less attention than it deserves. This relates to the phenomenon of “restoration constitutionalism,”⁹ a process under which, as part of the liberalising agenda, the transitional society is sought to be returned to the constitutional order that prevailed before the eclipse or collapse of democracy and/or the rule of law, rather than being faced with the prospect of fashioning a new constitutional order. This article will examine the phenomenon of restoration constitutionalism in relation to recent events in the South Pacific island state of Fiji—a jurisdiction where the transition from the disruptive effects of an attempted *coup d’état*—the third in less than a decade and a half—has been beset by problems of racial politics, electoral complexity and constitutional engineering.

The events described represent an instructive example of the “restoration” modality of transition. Fiji was able to return, quickly and successfully, from a state of constitutional breakdown to a democratic *status quo ante*. Instrumental to this achievement were the courageous efforts of the Fijian courts: by insisting on a return to a higher rule-of-law standard embodied in the pre-coup constitutional order, the courts strengthened rather

⁶ One telling contrast is that provided by South Africa, which, within a period of less than five years, moved fairly painlessly from apartheid rule to a functioning democracy based on inclusiveness and the rule of law, and Indonesia, where, despite the ouster of the ruling dictator, President Suharto, democracy has taken much longer to establish.

⁷ See, e.g., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Neil Kritz ed., 1995); Ruti G. Teitel, *Transitional Justice* (2000); *Transitional Justice and the Rule of Law in New Democracies* (J.A. McAdams ed., 1997); Juan J. Linz & Alfred C. Stephan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and post-Communist Europe* (1996); *The Politics of Memory: Transitional Justice in Democratising Societies* (Alexandra Barahona de Brito, Carmen Gonzalez-Enriquez & Paloma Aguilar eds., 2001).

⁸ The underlying assumption in this branch of study has, almost invariably, been that the transitional process is a liberalising, rather than a retrogressive, one. See, e.g., TEITEL, *supra* note 7, at 5.

⁹ The term is borrowed from Ruti Teitel. See TEITEL, *supra* note 7, at 206. Teitel touches upon this issue as part of her discussion of “transitional constitutionalism.” See *id.* at 191-211.

than weakened the state's commitment to liberal political virtues. The vigor, determination and alacrity with which the Fijian judiciary—at all levels—exerted itself in the attempts to arrest the longer-term impact of the coup on democracy and the rule of law, even as it recognized the limits of judicial activism in such circumstances, stands in sharp contrast to the traditional behavior of courts during periods of constitutional crises. This article argues that, where the “rupture” in a constitutional order is relatively short-lived, restoration constitutionalism provides a smoother and quicker return to liberal politics than any other modality of transition. In addition, several lessons concerning the costs and benefits of restoration constitutionalism may be generalized from the Fijian experience.

Before turning to the facts of the Fijian situation, it is useful to set out the legal and conceptual issues relevant to the current discussion. Part II of this article addresses this aspect. It deals with the nature of constitutions and constitutionalism, their role during transitional periods, the contribution made by constitutional courts to transitional processes, and the phenomenon of “restoration” constitutionalism—an issue especially pertinent in relation to Fiji. Part III sets out the factual and historical background to the crisis in Fiji which sparked the country's slide into violent anarchy in May 2000. This part includes a discussion of the various twists and turns in Fiji's constitutional odyssey over the years. Part IV describes the extraordinary contribution that the Fijian judiciary made to the restoration of constitutional values and the rule of law in the aftermath of the events of May 2000. Part V evaluates the gains and losses of the restoration process and outlines the lessons that can be drawn from the Fijian experience in transitional constitutionalism.

II. CONSTITUTIONALISM AND THE TRANSITIONAL PROCESS

The ever-present tension between constitutionalism and revolutionary change has occupied legal minds for centuries, and it has posed serious dilemmas for the architects of liberal regimes in societies emerging from authoritarianism or repressive government.¹⁰ Constitutionalism itself is a relatively non-contentious concept, even if disagreements have occasionally been expressed over some of its individual components. The following simple definition captures the essence of the concept:

Constitutionalism is the idea . . . that government can and should be legally limited in its powers, and that its authority depends on its observing these limitations.¹¹

¹⁰ See, e.g., HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* (1961).

¹¹ Wil Waluchow, *Constitutionalism*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2004), available at <http://plato.stanford.edu/entries/constitutionalism/>.

Implicit in that definition are several attributes, including: institutional realization of liberalism, recognition of the sovereignty of the people, affirmation of the supremacy of the constitution, and a conception of equality before the law under which the rulers are subject to the same discipline and legal constraints as the ruled.¹²

Constitutionalism has been seen as indispensable to democracies in the modern world; it is usually regarded as the glue which holds a liberal political order together and enables societies based on the rule of law to withstand the shocks that political upheavals inflict on them from time to time.¹³ However, that image of constitutionalism has recently been challenged as anachronistic, especially in the context of transitional processes. As Ruti Teitel notes in her pioneering study of transitional justice, “it cannot capture the constitutional developments associated with political change during the last half century and, as such, needs to be supplemented.”¹⁴ She offers an alternative paradigm of transitional constitutionalism in the following terms:

Transitional constitutionalism not only is constituted by the prevailing political order but also is constitutive of political change. This is the constitutional document’s constructivist role. Traditional constitutions arise in a variety of processes, [often playing multiple roles: serving conventional constitution’s purposes as well as] having other more radical purposes in transformative politics. Transitional constitution making is also responsive to prior rule, through principles that critically refine the prevailing political system, effecting further political change in the system. Transitional constitutions are simultaneously backward- and forward-looking, informed by a conception of constitutional justice that is distinctively transitional.¹⁵

Quite clearly, extraordinary situations usually call for exceptional responses, and this is reflected in the jurisprudence of transitional regimes which, as Teitel explains, “does not follow such core principles of legality as regularity, generality, and prospectivity—the very essence of the rule of law in ordinary times.”¹⁶ Even so, it would be wrong to assume that the normal principles of legality have no place in transitional constitutionalism. Indeed,

¹² See, e.g., Bo Li, *What is Constitutionalism?*, 1:6 PERSPECTIVES (2000) (citing STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 5 (1995), available at http://www.oycf.org/Perspectives/6_063000/what_is_constitutionalism.htm).

¹³ See, e.g., JOHN ELSTER & RUNE SLAGSTAD, CONSTITUTIONALISM AND DEMOCRACY: STUDIES IN RATIONALITY AND SOCIAL CHANGE (1988).

¹⁴ TEITEL, *supra* note 7, at 191.

¹⁵ *Id.*

¹⁶ *Id.* at 215.

as Teitel herself acknowledges, the situation is much more complex, and it consequently requires a nuanced response from analysts and policy-makers.¹⁷

It is worth noting, too, that many of the techniques deployed in transition-management are also routinely used in non-transitional contexts, so that any analysis which seeks to paint the transitional justice process as an exclusive or a special one, standing in complete isolation from ordinary legal processes, would be misleading. The following warning from the authors of a thought-provoking recent article on the subject deserves to be quoted *in extenso*:

In general, analysts of transitional justice, who are typically steeped in moral theory, political theory and science, or in highly theorised international law, have gone wrong through insufficient appreciation of the ordinary law of consolidated democracies. They have erred, not by virtue of inadequate moral or political analysis, but by holding a stereotyped picture of ordinary justice, one in which all laws are always prospective, individuals costlessly obtain compensation for all harms to person or property inflicted by others, and transitions essentially never occur because the legal system runs smoothly in settled equilibrium. In our picture, by contrast, ordinary lawmaking must routinely cope with policy shifts caused by economic and technological shocks and by changes in the value judgments of citizens and legal elites. These jarring discontinuities predictably create transition problems. The law has developed a range of pragmatic tools for managing such problems while maintaining social order, ensuring some stability of expectations, and occasionally aspiring to see justice done. None of this commits us to defending all of the law's pragmatic tools of transition-management, which are in some cases excessively crude, inadequately theorised, or defended on specious grounds. But it should explode the assumption that transitional justice is a distinctive topic that presents a distinct set of moral and jurisprudential dilemmas.¹⁸

That said, any approach which treats transitional justice measures as “presumptively suspect,” on the ground, for example, that they are usually

¹⁷ Teitel conceives of transitions being arrayed along a continuum, in which the possible modalities range, on the one hand, from “critical” (which involves a maximally transformative legal repertoire aimed at achieving a “clean break” from the policies of the previous regime) to, on the other, “residual” (in which the pre-existing legal order is largely preserved). *Id.* at 216.

¹⁸ Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, University of Chicago Public Law Working Paper No. 40, at 3-4 (2003), available at http://ssrn.com/abstract_id=387920.

retroactive and therefore illiberal, would be quite wrong as well. As even the authors cited above recognise, retrospective measures themselves often have important forward-looking justifications and it would, therefore, be unfair to dismiss them out of hand.¹⁹

A. *Paradigmatic Transitions Attempt “Clean Breaks” with the Past via Constitution-Making or New Enforcement Mechanisms*

Teitel’s new paradigm of transitional constitutionalism is, particularly relevant to situations which involve a distinct break with the past, either as a result of war,²⁰ revolution,²¹ or other cataclysmic event, or following a negotiated settlement reached between the leaders of the *ancien regime* and those desiring fundamental change in the character of the polity.²² Given the difficulties involved in the wholesale reconstruction of the political and legal systems which such transitions entail, the need for stop-gap constitutional arrangements is obvious: this need is usually met by a transitional constitution, designed to serve as a bridge between the old and new regimes. Such a constitution can, as well as providing some much-needed stability during what is usually a period of great political ferment, also act as a catalyst for the emergence of the new liberal order. Teitel cites South Africa’s transitional constitution of 1993²³ as a shining example of the creative manner in which transitional constitutionalism can be harnessed in favour of liberal values.²⁴

As demonstrated by the experience of some of the former Soviet bloc countries in the immediate aftermath of the fall of communism, constitution-making is not always a high priority for transitional regimes. Here, partly due to of a lack of consensus over an ideal model of constitutionalism for the future, and partly because of an urgent desire to embrace constitutional enforcement rather than constitutional deliberation,²⁵ the governments decided to establish constitutional courts with strong judicial review powers that would function under Soviet-era constitutional frameworks, albeit with some modifications to those frameworks.²⁶ This mode of transitional constitutionalism was intended to advance the rule of law by creating a new

¹⁹ *Id.* at 4.

²⁰ *E.g.*, member-states of the Former Yugoslavia.

²¹ *E.g.*, The Philippines at the end of the rule of President Marcos.

²² *E.g.*, South Africa. Such a clean break may also follow the decision of a colonial power to withdraw from territory it has ruled for a substantial period of time.

²³ S. AFR. (Interim) CONST. 1993.

²⁴ TEITEL, *supra* note 7, at 198.

²⁵ This desire is attributable to widespread popular disenchantment with the constitutional culture that had prevailed under communist rule where the rhetoric of rights was never matched by reality.

²⁶ Hungary and Poland are prime examples where, as late as 1994, not much movement was made towards drafting new constitutional texts.

culture in which human rights and other freedom-enhancing values did not remain mere paper promises.

The post-communist preference for enforcement mechanisms over new constitutional documents is an example of a gradualist approach to transitional constitutionalism under which newly democratised societies get the necessary space to debate contested conceptions of justice and the rule of law rather than being steamrolled into accepting one pre-determined model or another. Where a society has suffered oppression and despotic government for a significant length of time, this approach is clearly attractive, not least because of its tendency to help create an environment in which durable constitutional change is likely to take root. The disadvantage is that, in societies which are far too fractious or prone to grave instability, lengthy delays in settling the parameters of the new constitutional dispensation may result in the momentum for reform being lost.²⁷

So much for countries which have endured prolonged tyranny. But what about situations where the need is not so much to make a “clean break” with the past as to return the society to the pre-revolutionary political and constitutional order—an order which, for all its imperfections, nonetheless represented a reasonable adherence to liberal values and democratic pluralism? This question will be addressed at some length below in the context of Fiji where, it is submitted, the revolutionary events of May 2000, far from moving the country in a liberalising direction, had the effect of upsetting a delicate and carefully-crafted constitutional settlement which had sought, democratically, to promote freedom, equality and justice among the country’s deeply-divided peoples.²⁸

B. Restoration Constitutionalism Is an Alternative to the “Clean Break” of Paradigm Transitions

Also interesting for the purposes of the present article are the experiences of other post-Communist states which followed the “restoration” modality in their transitional odyssey and chose to return to their pre-revolutionary constitutional orders. Czechoslovakia (before its break-up), for instance, used the country’s 1920 Constitution as the template for its new constitution.²⁹ The attractiveness of this course of action is not difficult to see: for a people so deeply scarred by the experience of

²⁷ This may be said to have happened in Poland where it took the post-communist rulers some eight years to adopt a new constitution. See e.g., Irena Grudzinska Gross et al., *The 1997 Polish Constitution*, 6:2,3 EAST EUROPEAN CONST. REV. 64 (1997), available at <http://www.law.nyu.edu/eecr/vol6num2/feature/index.html>.

²⁸ This settlement was contained in the 1997 Constitution of Fiji—a document which was the result of extensive public consultation and which had been approved by a democratically-elected legislature representing all sections of the Fijian population.

²⁹ See Lloyd Cutler & Herman Schwartz, *Constitutional Reform in Czechoslovakia: E Duobus Unum?*, 58 U. CHI. L. REV. 531 (1991).

Bolshevik repression, it offered an opportunity to, as it were, obliterate the memory of Communist rule and to return to a political order which was, at least symbolically, far more comforting. Whether or not the move assures political stability is, of course, open to question, but as even a slightly sceptical Teitel concedes:

[R]estoration constitutions have a normative pull that manages to evade the dilemma of constitutional beginnings. To the extent that such transitional constitutions are restorative, there are seemingly no constitutional beginnings, only returns. Such constitutionalism eliminates the tensions inherent in constitutionalism in periods of political change.³⁰

Nor is restoration constitutionalism entirely backward-looking. Properly applied, it can achieve some beneficial results for the future, such as:

[P]roviding a method for the public to recapture lost traditions and institutions; depriving former officials of political and economic influence that they could use to frustrate reform; signalling a commitment to property rights, the market, [and in the case of divided societies, it may be added, protection for minority rights] and democratic institutions; and establishing constitutional precedents that may deter future leaders from repeating the abuses of the old regime.³¹

For a jurisprudence associated with political flux, transitional justice does, of course, involve a higher politicization of the law and also some compromise in rule-of-law standards.³² The scope for such politicization and compromise however, is often much reduced in the case of restoration constitutionalism as opposed to other modalities of the transitional process, as will be demonstrated below in relation to the events in Fiji. By insisting on a return to a higher rule-of-law standard embodied in the pre-revolution constitutional order, the Fijian courts have strengthened rather than weakened the state's commitment to those virtues usually associated with liberal politics.³³

Most constitutions are, it is widely agreed, the embodiment of compromises made between different societal groups. Where a prior constitution is the result of a duly constituted deliberative process, conducted on largely democratic lines, there is, arguably, a strong presumption of legitimacy attached to it which cannot be easily dismissed. This fact, coupled with the universally accepted idea that constitutions are

³⁰ TEITEL, *supra* note 7, at 206.

³¹ Posner & Vermeule, *supra* note 18, at 5.

³² See Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 90 (2003) [hereinafter Teitel, *Transitional Justice Genealogy*].

³³ See *infra* Part IV (defending this proposition).

made to last long and should not be allowed to be tinkered with unless absolutely necessary, lends a presumptive advantage to the process of restorative constitutionalism in post-revolutionary situations.

In the absence of any overwhelming reasons for rejecting a return to the *status quo ante*, restoration constitutionalism clearly holds out the promise of a minimally disruptive return to liberal politics. It usually avoids the need for the new government to embark on an extensive process of reconstruction (including the undoing—except minimally—of the effects of the intervening illiberal events). In societies where the prior constitution is associated with strong unifying sentiments which have not been dimmed by the passage of time, a return to it is often compelling: witness, for example, the sizeable support for a return to the monarchy in countries such as Romania and Serbia.³⁴ In some cases, a preference for the *ancien regime* may be based on nothing more than resistance to simple transplants or adaptations of constitutional structures from outside, especially the West.³⁵

Where the “rupture” in a constitutional order is comparatively short-lived, as was the case with Fiji,³⁶ restorative constitutionalism is particularly attractive, not least because it offers the prospect of greater constitutional continuity and a smoother and quicker return to liberal politics than would be the case with any of the other modalities of transition. Restorative constitutionalism, in these circumstances, also offers another practical advantage which is by no means insignificant: it dispenses with the need for protracted, expensive and often fractious negotiations for a new constitutional settlement and new political institutions, not to mention messy power-struggles for control of the constitution-enactment process. But a return to the pre-revolutionary order can only work where there is a sizeable popular consensus around that order,³⁷ and where the prior constitutional and legal infrastructure remains capable of reactivation at short notice.

C. *A Typology of Restoration Constitutionalism*

It is possible to construct a typology in the continuum of restoration constitutionalism based on the time-frame within which the process is attempted and/or completed. At one end of the continuum would be what may be called “deep” restoration where the reversion to the original constitution, i.e. the constitution which was overthrown by the intervening

³⁴ Whether such sentiments are based on hard-nosed assessments of the worth of the institutions around which they are centred or on mere nostalgia is immaterial for the purposes of the present argument.

³⁵ See András Sajó, Preferred Generations: A Paradox of Restoration Constitutions, 14 *CARDOZO L. REV.* 847, 854 (1993).

³⁶ The May 2000 coup was swiftly put down and an interim civilian government was installed within a matter of weeks, as is explained below.

³⁷ It would help, too, if the pre-revolutionary order was largely compliant with international norms on basic human rights, including the rights of effective democratic participation by ethnic, religious, racial, linguistic and other recognised minorities.

illiberal regime, is attempted after a significant length of time, usually many decades. Typical examples of this kind of restoration would be those considered in some of the former Soviet client-states such as the Czech Republic or Hungary on the fall of the Berlin Wall, where the pre-Communist constitutions had been out of use for half a century or more. Here, any return to the *ancien regime* would pose formidable practical difficulties, given the inevitable need to unravel a large number of settled transactions that may have occurred during the intervening period, and, in some cases, even a need to revive constitutional concepts, structures and provisions which may have suffered obsolescence along the way.³⁸

To some extent, any disconnect between the values of the original constitution makers and those of the transitional society may be remedied by creative interpretation or adaptation of the constitutional text by contemporary judges. In this way, the vexing problem of “generation related constitutional self,”³⁹ which is likely to dog some countries where a deep restoration is attempted, can be avoided. Where, however, the provisions of the original constitution are clearly inadequate to accommodate the needs of the present, or where the intervening period has seen irreversible changes of such magnitude as to render those provisions irrelevant, total restoration may not be an option.⁴⁰

At the other end of the continuum would be what may be called “shallow” restoration where the interregnum between the eclipse of the pre-revolutionary constitution and the end of the revolution is a very short one, as happened in Fiji in relation to the events described in this article. Here, the process of return is relatively easy and less painful, even if, as often happens, political compulsions may still require some compromises to be made to accommodate the competing demands put on the new government.

A number of restorations will fall between those two extremes, and, depending on how distant they are in time from the overthrow of the *ancien regime*, they may be classified as more or less deep. Generally speaking, the “deeper” the restoration, the greater the effort needed to stabilize the emerging political and constitutional structures. Where the liberalizing impetus itself comes from a revolution (a “counter-revolution”), there may be additional work to be done to reconcile the restored constitutionalism with the unsettled and often messy political landscape which emerges from the revolution. Such reconciliation would, for obvious reasons, be easier where the restoration has been shallow rather than deep.

³⁸ These difficulties may be compounded by a growing obsolescence of some of the concepts, principles and provisions of the prior Constitution.

³⁹ See, e.g., Sajó, *supra* note 35, at 847.

⁴⁰ Sajó cites the example of Czechoslovakia immediately after the end of Communism, noting that even a return to the quite advanced Masaryk Constitution was impossible in view of Slovak and other minority concerns. *Id.* at 853.

It stands to reason as well that deeper restorations involve higher costs than shallower ones. These costs may be either social costs (e.g. assuaging the hurt individuals and groups may have suffered as a result of the revolution) or material costs (e.g. providing for restitution of confiscated property), or both. Likewise, the problem of retroactivity in cases involving political justice loom larger in deeper restorations than they do in shallower ones.

In terms of legitimacy, deeper restorations may prove particularly problematic, because with each passing generation the bonds that connect the people to the *ancien regime* are likely to weaken; where, for example, the liberalising event occurs well after those who had any personal connection with, or experience of, the *ancien regime* have passed, it is possible that the prospect of a return to the political and constitutional arrangements of that regime may not appeal as strongly to the present rulers—and indeed to sections of the present populace generally—as it may have done to their predecessors. This has the potential to render any attempted restoration weak and contentious, given the lack of widespread popular enthusiasm for it. This may not, however, be true of all societies: in some, a strong institutional memory of the virtues of the *ancien regime* may guarantee an enduring appeal for it, regardless of the length of time that has elapsed since its extinguishment. This would make the process of restoration resemble more closely a “shallow” restoration rather than a “deep” one.

Interestingly, the impetus for the use of restorative constitutionalism usually comes, as it did in the case of the former Soviet client states referred to above, from the political establishment. In the case of Fiji, however, the higher judiciary played an equally, if not more, important role in pushing the process along. This may or may not be a good thing: much depends on the credibility and the prestige which the courts enjoy within the society undergoing transition; more importantly, the success of court-driven transitional initiatives is heavily dependent on the ability of judges to ensure that their orders are respected and implemented by politicians in both letter and spirit—an outcome which is by no means guaranteed in many societies. In this respect as well, the Fijian experience offers some unique insights which are worth studying.

III. FIJI: THE FACTUAL AND HISTORICAL BACKGROUND

A. *History*

To better understand the transitional process in Fiji, it is helpful to take a brief look at the recent history of that country and of the events which have shaped its destiny in the past few years. Although Fiji has experienced multiple crises since its independence from British rule in 1970, the focus

here is the *coup d'état* mounted in May 2000 and its aftermath. In one sense, it could be argued that the country has been in a state of transition since around 1987 (when the first of those crises erupted), but, for reasons of practicability, this article will concentrate on the transitional process which began with the reversal of the 2000 coup.

A group of 844 islands lying at the centre of the South Pacific, Fiji became a British colony in 1874 when the then ruling tribal chiefs, led by the 'King of Fiji,' Ratu Seru Cakobau, ceded the islands to Queen Victoria.⁴¹ The British soon began importing indentured labor from India to provide a workforce for Fiji's main economic activity, viz. sugarcane cultivation. Between 1879 and 1916 (when the indentureship ended), over 60,000 Indians had been brought into Fiji. Nearly half of them opted to stay on after their tenure of service had been completed, and following further waves of voluntary immigration, the Indian population steadily increased, so much so that by 1945 Indians formed a majority of inhabitants in Fiji.⁴² Although the administration was carried out under typical colonial lines, the British also gave the Fijian chiefs a limited amount of autonomy:

Through the system of indirect rule, evolved by Lord Lugard and applied by his successors elsewhere, separate Fijian institutions were established to facilitate ruling them. These institutions, while creating a 'state within a state', gave the Fijian chiefs limited powers to rule their people, and to deeply influence the subsequent history of the colony. The objectives underlying [the Governor, Sir Arthur Gordon's] policies were similar to those which had given rise to colonial practices elsewhere: a divide and rule policy whereby the colonial government divided in order to rule what it integrated in order to exploit.⁴³

One important policy decision the British made early on, with profound consequences in subsequent years, was to ordain that nearly ninety percent of the land mass of the country (the part left over after what had alienated to the Europeans) would remain under indigenous Fijian ownership.⁴⁴ The Indian population, since their release from labour indentureship,

⁴¹ In the Deed of Cession, signed on Oct. 10, 1874, Cakobau asked the British to "exercise a watchful control over the welfare of his children and people; and who, having survived the barbaric law and age, are now submitting themselves under Her Majesty's rule to civilisation."

⁴² By 1986, Indians accounted for 48.6 percent of the population and indigenous Fijians 46.2 per cent, the remaining being made up of Europeans, mixed-race Europeans, Chinese, and other groups. See HURST HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 427 (1996). The "other groups" include Rotumans, inhabitants of the neighbouring Pacific island of Rotuma—an island which is part of the territory of Fiji.

⁴³ VICTOR LAL, *FIJI: COUPS IN PARADISE* 2 (1990).

⁴⁴ Ralph R. Premdas, *Balance and Ethnic Conflict in Fiji*, in *THE POLITICS OF ETHNIC CONFLICT REGULATION: CASE STUDIES OF PROTRACTED ETHNIC CONFLICTS* 251, 253 (John McGarry & Brendan O'Leary eds., 1993).

progressively took to farming, leasing out lands for sugarcane cultivation from the indigenous Fijians. They made such rapid inroads into this sector that very soon control of sugarcane production passed into their hands.⁴⁵ Considering that the sugar industry is the backbone of the Fijian economy, and the fact that the lands had been taken on fixed-term leases from indigenous Fijians, Indian dominance in this sector rendered “what would normally be a powerful political base into a tinder box of communal conflict.”⁴⁶

The indigenous Fijian and Indian populations have, for the most part, remained separate over the years, each adhering to its own culture, religion, language and social customs. The sole determinant of identity is ethnic affiliation, with *de facto* segregation featuring in almost all walks of life, including clubs, trade unions and other voluntary organisations. One author ascribes this state of affairs to the history of British rule which, he says, is “broadly speaking, one of benevolent apartheid.”⁴⁷

Another legacy of British rule which has been at the root of Indian grievances over the years is the denial of electoral equality to the Indian population.⁴⁸ The origins of this grievance go as far back as 1904 when Indians went completely unrepresented in the colonial Legislative Council, even as the indigenous Fijians were given guaranteed representation.⁴⁹ The grudging allocation in 1916 of one seat to the Indians failed to assuage their feelings of disenfranchisement. By 1937, the position of the Indians had improved slightly,⁵⁰ but their basic demand for a “common” electoral roll, which would entrench the principle of “one-man-one-vote”, went unheeded. This issue was to have far-reaching implications for the future of democratic government in Fiji; it was rooted in a fear of Indian domination of Fijian politics, as one writer has explained:

Because the Fijians were governed under a separate native administration, the Indian demand for a common roll challenged European control of the colonial council and was interpreted as an attempt to introduce Indian political domination in Fiji. The equation of the demand for a common roll with the alleged desire of Indians to dominate politically

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ LAL, *supra* note 43, at 1.

⁴⁸ See, e.g., ROBBIE ROBERTSON & WILLIAM SUTHERLAND, GOVERNMENT BY THE GUN: THE UNFINISHED BUSINESS OF FIJI'S 2000 COUP 67 (2001).

⁴⁹ The Council comprised six elected Europeans, two nominated Fijians and ten European official members.

⁵⁰ Indians were granted five seats (three elected, two nominated) in an expanded Council, the other members of which were five Europeans (three elected, two nominated), five Fijians (all elected by the Council of Chiefs), and sixteen European officials.

the entire society has since become a pervasive theme in the communal politics of Fiji.⁵¹

The demand for a common roll was also resisted on another controversial ground, namely, the claim of indigenous Fijians, vis-à-vis Indians (who are often derisively referred to as “guests” to this day), to perpetual “paramountcy” in the governance of Fiji. This claim is not supported by any documentary evidence; instead, it appears to have acquired political force by virtue of repeated assertion.⁵² Whatever the merits of the claim, it has dominated political discussion and has proved to be the single biggest stumbling block on the road to the accommodation of Indian interests.

B. Independence and After

As Fiji moved towards independence from British rule in the 1960s, further changes were made to the electoral system, but the policy of sectoral representation continued.⁵³ This period also saw the emergence, for the first time, of political parties: two of them, the Alliance Party (with a support base drawn largely from indigenous Fijians, Europeans and others) and the National Federation Party (supported largely by Indians) dominated the scene. Despite strong resistance from the indigenous Fijians to the termination of colonial rule,⁵⁴ a combination of domestic British political compulsions and international pressure led to the colony being granted independence on October 10, 1970.

The grant of independence did not, however, resolve the intractable issue of a common roll. By way of temporary solution, a system combining communal and national representation within both ethnic groups (with parity of numbers in the lower house of the new bicameral legislature) was adopted. As a sop to Fijian nationalism, the Great Council of Chiefs was given a dominant role—including a veto on matters relating to Fijian land and customs—in the upper house. The Chiefs were also able, by virtue of their sheer numerical strength in the upper house, to block any changes that

⁵¹ Premdas, *supra* note 44, at 259.

⁵² Attempts have also been made to justify the claim on the basis of what some commentators consider to be a strained interpretation of the 1874 Deed of Cession. See, e.g., Stephanie Hagen, *Race, Politics, and the Coup in Fiji*, 19 BULL. CONCERNED ASIAN SCHOLARS 2 (1987).

⁵³ Under this policy, indigenous Fijians and Indians were allowed to elect their representatives to a new legislative council on exclusively ethnic lines.

⁵⁴ When it became clear that independence was inevitable, the first indigenous Governor-General, Ratu George Cakobau (the great-grandson of the “King of Fiji” who had ceded Fiji to the Crown in 1874) pleaded: “Let the British government return Fiji to Fijians in the state and in the same spirit with which Fijians gave Fiji to Great Britain.” N. MELLER & J. ANTHONY, *Fiji Goes to the Polls: The Crucial Legislative Elections of 1963*, at 103 (1968) (quoting Cakobau).

may be attempted to the Constitution enacted at independence,⁵⁵ if they chose to do so. Even as the issue of the common roll was kicked into the long grass, attempts were made to forge a government of national unity in the early 1980s, but these attempts foundered amidst increasing inter-ethnic rivalry.

A turning point in Fiji politics came in the general elections of 1987 when the National Federation Party, in league with the newly-formed Labour Party, managed to trounce the Alliance Party and pave the way for the first Indian-dominated government. Although this government was headed by an indigenous Fijian, Timoci Bavadra, it was seen as a clear challenge to Fijian “paramountcy” and it led to a sustained campaign, including violent protests, by a group which called itself the “Taukei Movement.” Using the growing unrest as a pretext, Lieutenant-Colonel Sitiveni Rabuka, a high-ranking officer in the Royal Fiji Military Forces, mounted a coup on May 14, 1987. Lt-Col. Rabuka stoked the fears of the Fijian nationalists and endorsed their “Fiji for Fijians” campaign, abrogated the Constitution, and declared Fiji a republic.⁵⁶

The aftermath of the 1987 events has been sufficiently well documented to merit brief repetition here.⁵⁷ Suffice it to say that those events marked a new low in inter-ethnic relations and led to a large-scale exodus of the Indian population. For the first time since the Second World War, Indians had once again been reduced to a minority.⁵⁸

The events of 1987 also led to the promulgation of another Constitution in July 1990 (this time by presidential decree)⁵⁹ which increased the political dominance of indigenous Fijians quite substantially. Under this Constitution, a new seventy-member legislative chamber was constituted, with thirty-seven seats being reserved for Fijians, as against twenty-seven for Indians, one for Rotumans and five for the other minorities, all to be elected by their respective communities. The position of Prime Minister was reserved for an indigenous Fijian. The Constitution also

⁵⁵ This Constitution had been enacted by an Order-in-Council passed by the departing British: the Fiji Independence Order 1970.

⁵⁶ The declaration of Fiji as a republic was made in a second coup in September 1987, after Lt-Col. Rabuka expressed dissatisfaction over insufficient progress on a new Constitution that he had promised immediately after seizing power the previous May. For an *ex post facto* justification by Rabuka of his actions in relation to the coups, see Sitiveni L. Rabuka, *The Fiji Islands in Transition: Personal Reflections*, in *Fiji Before the Storm: Elections and the Politics of Development* 7-20 (Brij V. Lal ed., 2000) [hereinafter *Fiji Before the Storm*].

⁵⁷ See, e.g., MICHAEL C. HOWARD, *Fiji: Race and Politics in an Island State* (1991); A. Ravuvu, *The Façade of Democracy: Fijian Struggles for Political Control 1830-1987* (1991); LAL, *supra* note 43; BRIJ V. LAL, *Another Way: The Politics of Constitutional Reform in Post-Coup Fiji* (1998); *Fiji Before the Storm*, *supra* note 56; *Confronting Fiji Futures* (Haroon A. Akram-Lodhi ed., 2000); *Coup: Reflections on the Political Crisis in Fiji* (Brij V. Lal & Michael Pretes eds., 2001).

⁵⁸ In the census which followed the 1987 coups, the population break-down was reported as follows: Indigenous Fijians—50.7%, Indians—43.7%, Rotumans and others—5.6%.

⁵⁹ Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990.

gave a bigger role to the Fijian Great Council of Chiefs: most appointees to the thirty-four-member upper house of parliament would henceforth have to be approved by the Council. For good measure, the Constitution also granted immunity from prosecution to those involved in the 1987 coups. But, in an interesting twist, the leaders of the Indian community managed to persuade the President to include in the Constitution a clause which required its provisions to be reviewed within seven years.⁶⁰

The Constitution was seen as blatantly discriminatory.⁶¹ Even so, it was accepted by the Indian political leaders who undertook, albeit reluctantly, to play by its rules in the hope that some of its unacceptable features could be changed during the promised review. That review was announced in March 1995 when the President of Fiji appointed a three-man Fiji Constitution Review Commission (FCRC) headed by Sir Paul Reeves,⁶² a former Governor-General of New Zealand. After extensive consultation with a wide range of interests—including overseas experts—the Commission presented a report⁶³ which was seen as comprehensive, balanced and well thought out.⁶⁴

C. *New Constitutional Beginnings*

The FCRC proposed a new Constitution to replace the 1990 document. Its recommendations as to the contents of the new Constitution were given wide public and parliamentary airing, and after much debate—including extensive consideration by a Joint Parliamentary Select Committee—most of the recommendations were adopted. It is worth noting that the FCRC had been obliged, under its Terms of Reference, to ensure that its work shall be geared towards “promoting racial harmony and national unity and the economic and social advancement of all communities.” Furthermore, it was required to “[bear] in mind internationally recognised principles and standards of individual and group rights”⁶⁵ while formulating its recommendations.

The new Constitution was signed into law on July 25, 1997 and brought into force exactly a year later after being unanimously passed by both Houses of Parliament. It embodied a Compact among Fiji’s peoples

⁶⁰ Fiji Islands Const. Amendment Act 1997 ch. 11 pt. 2 § 161.

⁶¹ A report prepared by the National Federation Party, with the assistance of Professor Yash Ghai, a well-known academic expert, condemned the document as being characterised by “racism, authoritarianism and feudalism.” See YASH GHAI, NAT’L FED’N PARTY, *THE FIJI CONSTITUTION OF 1990: A FRAUD ON THE NATION* 17 (1991).

⁶² The Fiji Constitution Review Commission.

⁶³ Fiji Constitution Review Commission, *The Fiji Islands: Towards a United Future*, Parliamentary Paper No. 34, 1996.

⁶⁴ See, e.g., ROBERTSON & SUTHERLAND, *supra* note 48, at 110-12.

⁶⁵ *Terms of Reference of the Fiji Constitution Review Commission*, issued by the President of the Republic of Fiji, Mar. 15, 1995.

based on a set of principles which reflect “shared understandings about the future participation of all ethnic communities and groups in the country’s life and government.”⁶⁶ It is worth noting, too, that “all the main political parties accepted that the primary goal of Fiji’s constitutional arrangements should be to encourage the emergence of multi-ethnic governments.”⁶⁷ In other words, the settlement reached had as wide a measure of cross-community support as could reasonably be expected in any divided society. Significantly, it was approved without dissent by a Parliament dominated by indigenous Fijians.

In terms of its main provisions, the Constitution first of all attempted to move the country away from the system of exclusively communal representation in Parliament, so that politicians were encouraged to look beyond their own narrow support-bases and address issues that concerned members of other communities as well. It made a modest beginning in that direction by ordaining that twenty-five of the seventy-one seats in the lower house (the House of Representatives) should be “open seats,” available for contest, and to be voted for, by people of all communities.⁶⁸ It required elections to be conducted under a system of proportional representation called the “alternative vote” rather than under the “first-past-the-post” system prevailing under previous Constitutions.⁶⁹ It also envisaged a multi-party Cabinet under which the Prime Minister (who would be someone who, in the opinion of the President, is capable of forming a government and likely to enjoy the confidence of the House of Representatives)⁷⁰ was required to invite all parties whose membership in the House of Representatives comprised at least ten percent of the membership of the

⁶⁶ This Compact was itself incorporated in the Constitution. See *Fiji Islands Const. Amendment Act 1997* ch. 2 § 6. Among the principles embodied in the Compact are that: the rights of all individuals, communities and groups are fully respected; the ownership of Fijian land according to Fijian custom, and the rights and landlords under leases of agricultural land, are preserved; the right to religion, language, culture and traditions of everyone is secured; the enjoyment of equal rights of all citizens, regardless of their communal affiliation, including the right to make their permanent homes in Fiji, is guaranteed; the rights of the Fijian and Rotuman people to governance through their own separate administrative systems is preserved; and in the event of any conflicts involving the interests of different communities, these shall be settled through negotiation in good faith. *Id.* Unsurprisingly, the Compact also included a provision to the effect that, in any such negotiations, “the paramountcy of Fijian interests as a protective principle continues to apply.” *Id.* ch. 2 § 6(j). To further reflect Fijian aspirations, the Parliament added another clause which required that “equitable sharing of political power amongst all communities in Fiji is matched by an equitable sharing of economic and commercial power.” *Id.* ch. 2 § 6(l). This was to counterbalance the advantage that the Indian community had traditionally enjoyed in the commercial sphere.

⁶⁷ Alison Quentin-Baxter, *Ethnic Accommodation in the Republic of the Fiji Islands* (Sept. 1999) (unpublished manuscript prepared for Waikato University School of Law), available at <http://lianz.waikato.ac.nz/PAPERS/baxter/Baxter1.pdf>.

⁶⁸ This represented a significant dilution by Parliament of the FCRC’s recommendation that forty-five seats should be designated as “open” seats. On the question of the compatibility of racially-based “reserved” seats, the FCRC accepted the opinion of an academic expert that “short-term differentiations based on race and ethnicity might be lawful if, historically, they had been generally accepted as the basis of political representation.” See *id.*

⁶⁹ *Fiji Islands Const. Amendment Act 1997* ch. 6 pt. 2 § 54(1).

⁷⁰ *Id.* ch. 7 pt. 3 § 98.

House to nominate Ministers in proportion to their respective strength in the House.⁷¹ Where a party declines to nominate, the number of Cabinet posts that it would be entitled to would be allocated among the other parties in proportion to their own entitlements. In the event of all parties declining to nominate, the Prime Minister will be at liberty to select MPs from his own party or coalition of parties to fill the Cabinet places.⁷² Significantly, the Constitution dispensed with the controversial requirement—introduced by the 1990 Constitution—that the Prime Minister could only be chosen from among indigenous Fijians.

The Constitution also does not require that the President or the Vice-President be an indigenous Fijian, although by conferring the power of appointment on the Great Council of Chiefs, the possibility of non-Fijians being appointed to these posts is generally seen as remote.⁷³ The Great Council of Chiefs has been allowed to retain its power of veto over certain amendments to the Constitution as they did under previous Constitutions.⁷⁴

A Bill of Rights, which is binding on all three branches of government at all levels and on any person exercising public functions, guarantees basic freedoms and liberties. The right to equality, by far the most contentious issue in Fijian society, has been qualified to allow for permissible discrimination in relation to such matters as the application of the personal law of individual communities,⁷⁵ affirmative action for disadvantaged groups,⁷⁶ land and fishing rights and chiefly status for members of the indigenous communities,⁷⁷ and the application of other customary laws.⁷⁸ The Constitution gives equal parity to English, Fijian and Hindustani languages,⁷⁹ and makes discrimination on the basis of language unlawful.⁸⁰ It prescribes no official state religion, despite strong demands from some indigenous Fijians to declare the country a Christian state.⁸¹

In sum, the 1997 Constitution was seen as offering a fair deal to all Fijians and as a document which held out the promise of a new beginning in inter-ethnic relations. The settlement it embodied was, by and large, acceptable to all sides, as the senior counsel to the FCRC noted:

⁷¹ *Id.* § 99. The total number of Cabinet posts was left to be determined by the Prime Minister.

⁷² *Id.* § 99(7)-(8).

⁷³ According to the criteria approved by the Great Council of Chiefs under the 1990 Constitution, anyone chosen for these posts must be "Fijians" of chiefly birth or chiefly descent. There is nothing in the 1997 Constitution to indicate that those criteria are no longer applicable. The only concession to democratic practice made in that Constitution is that the Great Council of Chiefs must consult the Prime Minister prior to making any appointment to either post. *Id.* § 90.

⁷⁴ These relate to the protection of the rights of the Fijian and other communities. *Id.* § 185.

⁷⁵ *Id.* § 38.

⁷⁶ *Id.* § 44.

⁷⁷ *See, e.g., id.* § 186.

⁷⁸ *Id.* § 186.

⁷⁹ *Id.* § 4.

⁸⁰ *Id.* § 38.

⁸¹ *Id.* § 5.

[A] majority in each community, sensitised perhaps by the 1987 coups and their aftermath, were ready to respond favourably to ways of strengthening the values and interests that all communities share, while continuing to protect the already well-recognised rights and interests of the indigenous people and other distinct communities or groups.⁸²

Even so, there were voices of dissent. A group of hardline Fijian nationalists, supported by a small but vocal minority of Muslim extremists, which had earlier launched a noisy, but unsuccessful, campaign to sabotage the acceptance of the Reeves Report continued to rail against the Constitution, arguing, among other things, that it represented a “sell-out” of the interests of the indigenous Fijians. This undercurrent of disgruntlement was to play a not insignificant part in the violent events of May 2000 described below.

D. The 1999 Election and the May 2000 Coup

The spirit of general goodwill which greeted the 1997 Constitution appeared to prevail in the run-up to the first general election held under its terms in 1999. In this election, in which the leaders of all the major parties stood for the “open” rather than “reserved” seats, a multiracial coalition, consisting of the Fiji Labour Party (FLP), the Fijian Association Party (FAP), the Veitokani ni Levenivanua Vekaristo (VLV), and the Party of National Unity (PANU) achieved a landslide victory, securing fifty-eight of the seventy-one available seats.⁸³ It paved the way for the first Prime Minister of Indian origin, Mahendra Chaudhry, who led the dominant partner in the coalition, the FLP.⁸⁴ The election was remarkable for a number of reasons, not least for the fact that the proportion of seats gained by the members of each community (regardless of their party affiliations) matched almost exactly the proportion of their respective community’s strength within the Fijian population.⁸⁵

The promise of greater inter-ethnic harmony held out by the results of the 1999 election was, however, short-lived. Within a year, the Chaudhry government was deposed in a *coup d’etat* mounted on May 19, 2000 by George Speight, a failed businessman of mixed Fijian-European parentage, who held many of its members hostage in the Parliament building. This led to the declaration of emergency by the President and the assumption of the

⁸² Quentin-Baxter, *supra* note 67, at 165.

⁸³ The two older parties, the predominantly Indian National Federation Party (NFP) and the Soqosoqo ni Vakavulewa ni Taukei (SVT), led by Sitiveni Rabuka in his new civilian incarnation, were effectively decimated.

⁸⁴ The FLP won 37 of the 58 seats secured by the coalition.

⁸⁵ See Quentin-Baxter, *supra* note 67, at 35.

reins of government by the army.⁸⁶ The coup was followed by widespread violence, arson and loss of life on a scale unseen during the 1987 coups.⁸⁷ Even so, it was put down and the hostages released within weeks. Speight and his co-conspirators were taken into custody, and subsequently tried and convicted for treason.⁸⁸

Opinion is divided on the reasons for the coup.⁸⁹ Certainly the rhetoric which accompanied the seizure of power by Speight relied heavily on alleged widespread dissatisfaction among the indigenous Fijian population over what it saw as a dilution of its rights and privileges by the 1997 Constitution. In particular, it was argued that, by not recognizing—and entrenching—the paramountcy of Fijian interests, the Constitution had denied the indigenous Fijians their right under international law to internal political control. This argument had been decisively rejected as untenable by the leaders of all major political parties, including the Fijian nationalist SVT⁹⁰ party, in the run-up to the adoption of the Constitution. These leaders maintained that international law did not confer on members of indigenous communities any rights of paramountcy or predominance over other citizens, for that would amount to a breach of the basic principle of equality enshrined in all global human rights instruments.⁹¹

Other factors, too, appear likely to have played a part in the coup. One noticeable difference between the 1987 coups and the events of May 2000 was that, whereas the former had the full backing of the Fijian army, the latter did not: if anything, the army, under the leadership of Commander Bainimarama, became a key player in thwarting the designs of Speight and his fellow revolutionaries.⁹² Their resort to nationalist rhetoric, which found

⁸⁶ The President, Ratu Sir Kamesese Mara, also prorogued Parliament for six months. On May 29, 2000, he himself “stood down” and the Head of the Fiji Armed Forces, Commander Bainimarama, assumed the powers of the President before appointing another civilian, Ratu Uluivuda, to the post on July 13, 2000.

⁸⁷ Some 16 persons were reported to have been killed in the violence which followed the coup; a large number of (mostly Indian-owned) shops and farm houses were torched; and, for the first time in Fiji’s history, a refugee camp had to be set up to house those fleeing the carnage.

⁸⁸ For a detailed account of the circumstances surrounding the coup, see Brij V. Lal, *Madness in May: George Speight and the Unmaking of Modern Fiji* [hereinafter Lal, *Madness in May*], in *Fiji Before the Storm*, *supra* note 56, at 175-194.

⁸⁹ Among the explanations that have been offered are: growing disgruntlement among indigenous Fijians over the “concessions” made by the 1997 Constitution to non-Fijian (i.e. Indian) interests; social, economic and political divisions among that community; alienation of some sections of the business community by the socialist policies of the Chaudhry government; and, last but not least, Speight’s own overweening political ambitions. See, e.g., *id.*; Susanna Truka, *Introduction: Communities in Crisis*, 25:4 *PACIFIC STUDIES* 1 (2002).

⁹⁰ Soqosoqo ni Vakavulewa ni Taukei.

⁹¹ See, e.g., Parliament of Fiji, *The Daily Hansard*, June 30, 1997, House (speech of Sitiveni Rabuka, the leader of the SVT party, in the Fijian Parliament, in the debate over the Reeves Report). It is interesting to note, in this context, that the provisions of the 1997 Constitution had been expressly approved by the highest official body representing indigenous Fijian interests, the Great Council of Chiefs, who were satisfied that those interests had been duly protected. See LAL, *supra* note 43, at 99.

⁹² Commander Bainimarama has, since the reversal of the coup, been in the forefront of the efforts to bring to justice those army officers who were seen to have supported Speight and his fellow plotters.

a ready echo among disgruntled sections of the indigenous population, was, it appears, but an opportunistic ploy to conceal their true designs.⁹³ It has also been suggested that the events of May 2000 may have drawn sustenance from serious tensions that had been growing over the years between Fijian commoners and the traditional chiefs. Many prominent politicians representing Fijian interests had been prophesying an end to the power and privilege enjoyed by the chiefs and to their dominance in government.⁹⁴

Despite the relatively swift suppression of the coup, efforts to return the political institutions to their original state were tardy, and in some vital respects non-existent. The martial law administrator, Commander Bainimarama, handed over power to an Interim Civilian Government, headed by Laisinia Qarase, a former merchant banker and senator, on July 4, 2000, but not until after announcing his decision to abrogate the 1997 Constitution. The Qarase government showed no indications of wanting to reconvene Parliament. A situation of political paralysis ensued, although a degree of normality had been restored to civilian life within weeks.

IV. THE FIJIAN JUDICIARY'S CONTRIBUTION TO CONSTITUTIONAL RESTORATION

A. *The Prasad Litigation*

In the midst of all this, one institution of state which showed a remarkable willingness to stem the illiberal tide and to restore democracy and the rule of law was the judiciary. In the first of a series of high-profile rulings,⁹⁵ the High Court of Fiji, sitting in Lautoka, held, among other things, that: (a) the coup mounted by George Speight and his supporters had been unsuccessful; (b) the purported abrogation of the Constitution by Commander Bainimarama was null and void; and (c) the Parliament which had been elected in 1999 had not been dissolved, but was merely prorogued. These rulings came in a case filed by Chandrika Prasad, an Indo-Fijian farmer whose property had been torn down by a marauding mob in the immediate aftermath of the coup. The court, after embarking on a detailed discussion of the doctrine of necessity and the doctrine of revolutionary legality (a doctrine which has in the past often been used to justify regime

⁹³ A highly plausible explanation for the coup, offered by commentators such as Lal, is that it was an act of naked self-interest by Speight and a group of ambitious young businessmen like him who, having profited from economic largesse in the form of large, unsecured loans supplied by the National Bank of Fiji with the blessings of the Rabuka Government in the 1990s, suddenly found their prospects for continued prosperity dimming under the new administration of Mahendra Chaudhary. Lal, *Madness in May*, *supra* note 88, at 181. It is worth noting that Speight had been staring at financial ruin just before the coup, having been dismissed as the head of the Fiji Pine Commission and Hardwood Corporation—a post he had held under political patronage—and having also been declared an undischarged bankrupt.

⁹⁴ See, e.g., *id.* at 192.

⁹⁵ Chandrika Prasad v. Republic of Fiji [2001] NZAR 385.

change following a *coup d'états*) struck a decisive blow for constitutionalism and for the primacy of the rule of law. The doctrine of necessity could not, it said, “be used to give sustenance to a new extra-constitutional regime. Nor could it provide a valid basis for abrogating the Constitution”⁹⁶ These sentiments were endorsed by the Fiji Court of Appeal in appellate proceedings brought by the Government.⁹⁷

The judiciary’s determination to reverse the assaults on the Constitution and the rule of law manifested itself in a number of other decisions as well. In *Jokapeci Koroi & Ors. v. Asesela Ravuvu & Ors.*,⁹⁸ the High Court rebuffed an attempt by the Interim Civilian Government to introduce a new constitutional dispensation which would have done away with many of the checks and balances—including safeguards for minority rights protection—that were contained in the 1997 Constitution. Holding that it was no part of the legitimate or reasonable mandate of a caretaker government to bring about such drastic changes to the body politic of the nation, the Court stopped the formation of a Constitutional Review Commission in its tracks. Such a step, it said, could only be taken by a democratically elected government:

The doctrine of necessity is a narrow doctrine and does not cover matters outside of the routine and the necessary. Unusual programmes of expenditure or reformist projects are the prerogative of an elected government. A lawful government needs to be buttressed by holding the confidence of the House of Representatives, and by acting within the Constitution with the two other bodies of Parliament, namely, the Senate and the President. Moving in advance of the will of Parliament in reformist fields, however well intentioned, is not an act which the courts will validate under the necessity doctrine. The authorisation for the expenditure of public funds for such reform work is similarly outside the permitted scope of work of a caretaker Cabinet. Such authorisation is unlawful. Parliament which carries the necessary constitutional jurisdiction and authority for reform may, when elected, set up a Parliamentary Select Committee for such work.⁹⁹

The case for preserving the pre-revolutionary constitutional scheme—and historic constitutional values—was put even more forcefully in another case¹⁰⁰ in which the High Court had been called upon to rule on the legality of a fiscal measure which the Interim Civilian Government had attempted to

⁹⁶ *Id.* at 403.

⁹⁷ Republic of Fiji v. Chandrika Prasad [2001] NZAR 385.

⁹⁸ Action No. HBC 131-2001-L.

⁹⁹ *Id.* (citations omitted). Order of Gates J., June 15, 2001 (copy on file with author).

¹⁰⁰ Jokapeci Koroi & Ors. v. Commissioner of Inland Revenue & Anr., Action No. HBC179/2001L.

introduce through decree. After finding that no case had been made out by the government which demonstrated any real or urgent need for the measure—thus ruling out resort to the doctrine of necessity¹⁰¹—the court underlined the need at all times for the Constitution to be salvaged from the wreckage left behind by usurper regimes:

Even in an extreme case, where a usurper leaves behind nothing of the past, the original Constitution remains submerged. When the usurper withdraws, it will re-emerge. During the rule of the usurper, judges may choose to accord validity to the usurper's rule under the doctrine of effectiveness, although I have indicated the world trend is against according legitimacy in these circumstances.¹⁰²

The court's observations on the sanctity that is to be accorded to a democratically-accepted Constitution are worth noting as well. Such a Constitution is, said the court, indestructible:

The Constitution's very indestructibility is part of its strength. It is not possible for any man to tear up the Constitution. He has no authority to do so. The Constitution remains in place until amended by Parliament, a body of elected members who collectively represent all of the voters and inhabitants of Fiji. During a period of dire emergency it may endure suspension, if such a suspension will ultimately see the Constitution supported, and ensure its re-emergence. Such a situation occurred in Fiji following the events of 19 May 2000.¹⁰³

Insofar as the Fijian judiciary has played a crucial, defining role in forging post-revolutionary constitutionalism, some parallels can be drawn with the constitutional courts established in Eastern and Central Europe since the fall of the Berlin Wall. Although the factual circumstances prevailing in those countries were markedly different from those obtaining in Fiji, the similarity in the legitimacy which the respective judiciaries enjoyed in the eyes of their own people is striking. In Fiji as in Eastern Europe, when confronted with authoritarian measures which threatened basic constitutional values and human rights, concerned citizens turned to the courts who were able, in the words of Ruti Teitel, "to draw a thin but bright line demarcating the rule of law."¹⁰⁴

¹⁰¹ "There is a danger," said the court, "in allowing the doctrine of necessity to degenerate into a doctrine of convenience, a doctrine to avoid awkward or embarrassing situations." *Id.* at 25 (official transcript).

¹⁰² *Id.* at 20 (official transcript).

¹⁰³ *Id.* at 16 (official transcript).

¹⁰⁴ Ruti Teitel, *Post-Communist Constitutionalism: A Transitional Perspective*, 26 COLUM. HUM. RTS. L. REV. 167, 182 (1994).

Also, the Fijian judiciary, like some of the post-communist constitutional courts, served as a beacon of hope in a bleak political landscape. By their principled approach which steered well clear of confrontational tactics or needless grandstanding, the judges managed to acquire a degree of legitimacy unmatched by any other agency of state. They may also have, albeit unwittingly, helped define a more principled politics, as did, for example, the Russian Constitutional Court in its bruising encounters with the Yeltsin administration in the early 1990s.

B. Commitment to Constitutional Continuity

Viewed objectively, the actions of the Fijian courts represent a commitment to the principle of constitutional continuity, which, as a rule of law value, is rightly prized in both ordinary and transitional times. The advantages of this course of action are only too obvious: not only does it avoid the turmoil and the pains associated with constitutional “clean breaks,”¹⁰⁵ it also helps to ease the tension between constitutionalism and political change that is inherent in societies struggling to return to democracy and the rule of law. A similar kind of constitutional continuity was seen in those former Soviet bloc states which had experienced “velvet revolutions,” although the impetus for such continuity in those states came not from the courts but from negotiated political processes.¹⁰⁶

Even when viewed in the light of the classic rule-of-law dilemma which arises in post-revolutionary states,¹⁰⁷ the Fijian courts’ adherence to the principle of constitutional continuity is not without virtue. It accords fully with the requirement, often asserted by legal positivists, that “the principle of rule of law governing transitional decision-making should proceed—just as it would in ordinary times—with full continuity of the written law.”¹⁰⁸ The written law, in the case of Fiji, moreover, is a prior law which, as noted earlier, enjoyed a high degree of popular legitimacy before its attempted extinguishment by an interloper. Here, the rule-of-law value was, it is submitted, properly served by the Fijian judiciary’s insistence on constitutional continuity.

Interestingly, the Fijian approach accords just as well with the natural law position under which there is an expectation that the rule of law will, in paradigmatic transitions, turn its face decisively against injustices committed by tyrannical or oppressive past regimes, regardless of whether such

¹⁰⁵ Including the need, for example, to forge a new constitutional consensus which is extremely difficult in deeply divided societies.

¹⁰⁶ See, e.g., Andrew Arato, *The Constitution-Making Endgame in Hungary*, EAST EUROPEAN CONST. REV. 31 (Fall 1996).

¹⁰⁷ For a discussion of this dilemma, see Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2018-21 (1997).

¹⁰⁸ *Id.* at 2019.

injustices could be justified under any putative laws introduced by those regimes. Given the peculiar circumstances under which the Fijian judges were called upon to adjudicate, they did not have to deal with complex questions usually associated with such putative laws. Their approach did, however, affirm such classic rule of law attributes as predictability, foreseeability and, most important of all, security—in the protection of both the person and property.¹⁰⁹

Although the exertions of the judiciary did not result in the reinstatement of the duly elected government of Prime Minister Mahendra Chaudhry¹¹⁰—the government which had been deposed, and whose members had been taken hostage, by George Speight and his accomplices—they did, however, put a brake on Fiji's slide into lawlessness and military rule. To the extent that the *status quo ante* was not fully restored, there was indeed a discontinuity, but this discontinuity did negligible damage to the meta-rule-of-law value which was, when seen in the round, upheld in abundant measure.

C. *Putting Down Markers*

In practical terms, the series of high-profile court judgments put an end to General Bainimarama's ambitions of jettisoning the 1997 Constitution and establishing an extra-constitutional regime in which the military would have played a dominant, if not exclusive, role, and which would, arguably, have led to the permanent—or at least long-term—eclipse of civilian government in Fiji. But more importantly, these judgments put down some crucial markers which, viewed through the “restoration constitutionalism” prism, are hugely significant: they signalled, in the strongest possible terms, the need for a return to the pre-revolutionary constitutional order, albeit with some compromises being made along the way. As a result of the judiciary's efforts, even the military, which had attempted to abrogate the Constitution in the immediate aftermath of the May 2000 coup, now respects the supremacy of that document.

Quite clearly, the vigor, determination and alacrity with which the Fijian judiciary—at all levels—exerted itself in the attempts to arrest the

¹⁰⁹ Here, a parallel can be drawn with the approach adopted by the Hungarian Constitutional Court in its judgment of Mar. 5, 1992 (Magyar Kozlony No. 23/1992) on the constitutionality of the law which allowed the retrospective prosecution of those responsible for suppressing the 1956 uprising against Soviet occupation.

¹¹⁰ An attempt to achieve the reinstatement failed in the High Court, because the presiding judge, Scott J., took the view that, although the President of the Republic had committed a constitutional breach by not reconvening the Parliament that had been suspended as a result of the May 2000 coup, this breach could be condoned under the doctrine of necessity. Furthermore, since fresh elections had already been held and a new Prime Minister (Qarase) elected by the time the case was heard in the High Court, it was “not feasible to turn the clock back” to the pre-coup position as that would cause a “legal and administrative nightmare.” *Rev. Akuila Yabaki & Ors. v. President of the Republic of the Fiji Islands & Anr.*, Civil Action No. HBC 119 of 2001S, Judgment dt. July 11, 2001, at p.17 (official transcript).

longer-term impact of the coup on democracy and the rule of law, even as it recognised the limits of judicial activism in such circumstances, is extraordinary. It stands in sharp contrast to the traditional behavior of courts during periods of constitutional crises.¹¹¹ Part of the reason for such judicial courage is, it is submitted, the fact that nearly all the judges who heard the cases described above were “foreign,” i.e., judges specially brought in from other jurisdictions such as Australia, New Zealand and Tonga, to sit in the higher courts of Fiji. These judges are unlikely to carry any political or chauvinistic baggage of a kind to which home-grown judges are, alas, all too often prone in most jurisdictions. They are also, on the whole, likely to be more detached in their assessment of highly charged arguments of a political nature that feature quite prominently in such cases.

More significantly, the heroic efforts of the courts in returning Fiji to the rule of law and to democratic politics continued well beyond the restoration of the 1997 Constitution. In that sense as well, the Fijian experience is exceptional, because not many coup-affected countries can lay claim to similar judicial activism in recent years. It may be useful in this context to look at the impact that the actions of the Fijian judiciary had on subsequent political developments.

D. Reinstating Pre-Coup Constitutional Values

This return to the pre-revolutionary constitutionalism involved a journey which was as painful as it was slow. (It is also a journey which is far from complete). The Interim Civilian Government ordered fresh elections to the Fijian Parliament in August-September 2001—elections which, despite the somewhat febrile atmosphere in which they were held, were seen to be, on the whole, free and fair. They brought forth a coalition government headed by Laisenia Qarase, whose party, the Soqosoqo Duavata ni Lewenivanua (SDL) emerged as the single largest party in Parliament,¹¹² with the Fijian Labour Party (FLP), still headed by Mahendra Chaudhry, coming a close second.¹¹³

Under the terms of the 1997 Constitution,¹¹⁴ every party which has ten percent or more of the membership of the House of Representatives was entitled to representation in the Cabinet in direct proportion to their numbers in the House. Accordingly, Chaudhary as the leader of the FLP staked his claim to Cabinet seats, but his claim was ignored by the Prime Minister on the grounds that there was a huge and unbridgeable gap in policy terms between the SDL and FLP which made it impossible for any agreement to be

¹¹¹ See, e.g., George J. Alexander, *The Illusory Protection of Human Rights by National Courts During Periods of Emergency*, 5 HUM. RTS. L.J. 1 (1984).

¹¹² It won thirty-two of the seventy-one available seats.

¹¹³ It won twenty-seven seats.

¹¹⁴ Fiji Islands Constitution Amendment Act 1997, § 99 (5).

reached on a programme for government. The Prime Minister also argued that he already possessed, by virtue of his coalition, the necessary numbers in the House to form a stable government, and that he did not therefore need any support from the FLP. If he was forced to enter into a coalition with Chaudhary, there was, he said, a real risk that his own party would become a minority within such coalition—a risk which he was simply unwilling to countenance.¹¹⁵

In purely legal terms, the Prime Minister's stand was that the constitutional provision requiring power-sharing did not automatically entitle any political party with ten percent or more representation in Parliament to be given seats in the Cabinet. All that it required was for the Prime Minister to invite all eligible parties to be represented in the Cabinet—a requirement which was just a mandatory first step in good faith negotiations aimed at forming a multi-party government. If those negotiations failed to produce agreement, the Prime Minister could treat the failure as an implied rejection of his invitation by the other party or parties and proceed to allocate the Cabinet seats to which they were entitled among other participating parties in proportion to their respective initial entitlements, as provided by the Constitution.¹¹⁶

Following Qarase's failure to offer the FLP any Cabinet seats, Chaudhary approached the courts. After extensive arguments in which rival interpretations of the constitutional provisions on power-sharing were canvassed, the High Court,¹¹⁷ the Court of Appeal¹¹⁸ and the Supreme Court¹¹⁹ all came to the conclusion—unanimously in each case—that the requirement of power-sharing was mandatory and not merely optional. The obligation contained in Section 99 of the Constitution could not be fulfilled, said the judges, by the Prime Minister merely opening negotiations in good faith, as Qarase had contended. They drew support for this conclusion from the wording of Section 99, the guidance offered by other relevant provisions (including, importantly, the Compact contained in Section 6 with its strong

¹¹⁵ The Prime Minister had, however, as a matter of formality written to Chaudhary inviting him to join the Cabinet under the terms of Section 99(5) of the Constitution, and Chaudhary had replied in the affirmative. However, Chaudhary insisted that his party's participation in government would be in accordance with the provisions of the 'Korolevu Declaration'—a Declaration issued by the leaders of certain political parties in 1999, but to which the SDL had never assented. One of the requirements of that Declaration was that "Cabinet decision making in Government should be on a consensus seeking basis especially with regard to key issues and policies."

¹¹⁶ Fiji Islands Const. Amendment Act 1997, ch. 7 pt. 3 § 99(7). The Constitution further provides that, where all parties to whom invitations have been issued decline such invitations, the Prime Minister could fill the vacancies in Cabinet from his own party or coalition of parties. *Id.* §99(8).

¹¹⁷ Civil Action No. 282/2001L, Judgment dt. Apr 24, 2002.

¹¹⁸ Judgment dt. 24 May 2002. See also, Miscellaneous Case No. 1/2001, Judgment dt. Feb. 15, 2002, in which the Court of Appeal offered its opinion on a Case Stated by the High Court on 29 Nov 2001.

¹¹⁹ Civil Appeal No. CBV 0004 of 2002S, Judgment dt. July 18, 2003.

emphasis on an “equitable sharing of political power”), and the historical background to the 1997 Constitution.¹²⁰

The judges gave short shrift to Qarase’s argument that the wide policy differences which existed between his party and that of Chaudhary, made power-sharing all but impossible:

In the context of the prior history and the constitutional crises to which we have referred above, power sharing amongst the ethnic communities of Fiji, as expected to be reflected (at least in the medium term) in the party affiliations of members of the House of Representatives, was a central purpose of the Constitution. That purpose would not be served and, indeed, could be fundamentally undermined, if an invitation by a Prime Minister under s. 99(5) could be subject to conditions or if the establishment of a multi-party Cabinet were determined by the fact, let alone by the Prime Minister’s opinion, that a political party which comprises at least ten per cent of the membership of the House, was unwilling to pursue or accept particular policies.¹²¹

Nor, said the Court, was it inevitable that policy differences between members of a coalition of parties would sabotage a power-sharing government, especially under the Westminster model with its strong traditions of collective responsibility of ministers and cabinet confidentiality:

Division of opinion in cabinets is nothing new. The conventions of collective responsibility and cabinet confidentiality respond to division and allow conflict in Cabinet to be managed so that effective government is possible. The Prime Minister is entitled therefore to say that his own appointees intend to implement the policies of his party. That is not to prevent representatives of other parties from urging their own policies where they arise. Nor is it beyond the bounds of possibility that negotiated outcomes in the national interest will be reached. Section 99 [of the Constitution] aims to encourage debate on contentious policies including debate across party lines. It may also be observed that there is much in the routine business of government that will not involve any real clash of

¹²⁰ The Supreme Court noted, for example, that “[t]he Constitution of 1997 is the product of a long period of social and political tension in Fiji including a number of events that can only be described as constitutional crises.” *Id.* at 30 (official transcript).

¹²¹ *Id.* at 45.

policy at all. Indeed, much of the routine work of individual Ministers does not require references to Cabinet.¹²²

Having thus failed in his attempts through the courts to keep the FLP out of government, Qarase was compelled to enter into negotiations with Chaudhary on power-sharing. These negotiations dragged on for several months, and included a further round of legal proceedings in which the Supreme Court was asked to clarify the formula to be used for the apportionment of Cabinet seats between the SDL and FLP respectively. The Supreme Court's verdict,¹²³ namely, that the FLP was entitled to fourteen seats in a thirty-six-member Cabinet (with the SDL enjoying sixteen places), was seen by observers as offering the prospect of ending "once and for all the three year constitutional crisis over power sharing,"¹²⁴ but in the event no such result ensued. Faced with the humiliation of being offered some of the most inconsequential ministries by Qarase (some of these ministries were little more than departments carved out of existing ministries held by the SDL), the FLP, in November 2004, decided against joining the government. Chaudhary opted instead to take on the post of Leader of the Opposition, in which role he vowed to hold the government accountable to the electorate, and resolved to lead his party back into power at the next general elections, scheduled for 2006.

E. Punishment of the Coup-Leaders

Meanwhile, in a further move designed to persuade both domestic and international public opinion about its determination to return Fiji to the rule of law, the Qarase government embarked on a swift trial of George Speight and ten others who were involved in the attempted coup and the seizure of Parliament in May 2000. The issue of punishment for the coup-plotters aroused strong passions within the country, and it was viewed by many observers as likely to exacerbate extremist, radical feelings among a section of the indigenous Fijians, who saw Speight as a hero capable of resisting Indian "domination" in Fijian politics and government.¹²⁵ The legal proceedings against Speight provoked many unanswered questions, not least on account of the fact that Speight, in a dramatic move, pleaded guilty to the central charge of treason at the outset of the trial. Although he was awarded the mandatory death sentence applicable for this offence, the sentence was

¹²² *Id.* at 40.

¹²³ Judgment dt. July 9, 2004.

¹²⁴ S. Chandrasekharan, *Fiji: Rule of Law Prevails*, S. ASIA ANALYSIS GROUP, Aug. 17, 2004, available at <http://www.saag.org/%5Cpapers11%5Cpaper1092.html>.

¹²⁵ The popularity of Speight among indigenous Fijians could be gauged by the fact that, in the August-September 2001 elections he had, whilst still in detention, stood as a candidate for the Conservative Alliance Party and got elected to the House of Representatives, although his career as an MP was short-lived as he could not attend two consecutive sessions of Parliament and was thus unseated.

promptly commuted to one of life imprisonment in what has been seen as the result of a political deal by most observers.¹²⁶ His ten co-accused were sentenced to jail terms ranging from eighteen months to three years, after their charges were reduced from treason to wrongful confinement of members of the government—another example, it is said, of a plea-bargain.¹²⁷

A number of other persons have also been implicated in the May 2000 coup, and some of them have since been charged and convicted of aiding and abetting Speight and his accomplices. The most high-profile of such defendants, Ratu Seniloli, who continued to hold office as Vice-President of the Republic until as recently as August 2004, was sentenced to four years' imprisonment, although in yet another controversial move, the Qarase government offered him early release a few months later on grounds of his poor health. Other prominent figures in the Fijian political establishment who have been convicted for their participation in coup-related activities include a former Deputy Speaker of the national parliament, a former sports minister, and a former Attorney-General.

It is believed that the swift and decisive punishment for Speight and his fellow plotters owed much to international pressure, notably from the Governments of Australia and New Zealand.¹²⁸ Whatever the truth of the matter, there is no denying that there was considerable Australian involvement in the trial proceedings, with Peter Ridgeway and Mark Tedeschi, two Australian lawyers, leading the prosecutions against Speight and Seniloli respectively. It is believed, too, that another Australian, Andrew Hughes, who has occupied the position of Police Commissioner in Suva in recent years, kept up the pressure for the coup-plotters to be brought to justice. It is not without significance, incidentally, that a large measure of intimidation preceded some of the trials: in the proceedings against Speight, for example, the judge originally assigned to the case, Justice Peter Surman (from England), decided to withdraw and leave Fiji after receiving death threats.¹²⁹

Whether the full truth about the coup and about those involved in planning and executing it has been exposed by these trials is a moot question. There has been considerable speculation within Fiji and outside

¹²⁶ Under Fijian law, the President of the Republic can commute sentences of death if so advised by a Commission on Prerogative of Mercy. A recommendation to that effect was made in the case of Speight within hours of his being sentenced on February 18, 2002. In a separate move, the Attorney-General had moved a Bill in Parliament to abolish the death penalty altogether, but that Bill had not been approved by Parliament at the time of Speight's sentencing.

¹²⁷ See, e.g., *Jail for Fiji Rebels*, BBC NEWS, Feb. 19, 2002, <http://news.bbc.co.uk/1/hi/world/asia-pacific/1828650.stm>.

¹²⁸ See, e.g., Frank Gaglioti, *Fijian Vice-president on Trial for Treason*, WORLD SOCIALIST WEBSITE, July 1, 2004, <http://www.wsws.org/articles/2004/jul2004/fiji-j01.shtml>.

¹²⁹ See, e.g., *Fiji Seeks Judge for Speight Trial*, BBC NEWS, Jan. 31, 2002, <http://news.bbc.co.uk/1/hi/world/asia-pacific/1794558.stm>.

that the coup had the backing of many others who may have succeeded in escaping prosecution.¹³⁰ Most commentators are agreed, however, that the speedy manner in which most of the coup-related trials were conducted at least helped avert serious unrest and potential large-scale violence, especially in the national capital, Suva.

The treatment of George Speight and the others involved in the derailment of democracy in Fiji raises some interesting questions for transitional justice scholars about the appropriateness of the methods chosen to deal with the grave human rights abuses which accompanied the May 2000 coup, but those questions are beyond the scope of the present article and must await consideration elsewhere.

V. THE RESTORATION: AN IMPERFECT BUT NOT INSIGNIFICANT SUCCESS

A. *Costs and Gains of the Return to Constitutionalism*

As with most transitions, the return to constitutionalism was neither painless nor without cost. The cost, in tangible terms, consisted of a jettisoning, on the questionable grounds of “necessity,” of a democratically elected Parliament and a duly constituted government.¹³¹ (In effect, this meant the disenfranchisement of the sizeable majority of Fijians who had supported the Fiji Labour Party.) Although the High Court of Fiji acknowledged that the President of the Republic was in clear breach of the Constitution when he failed to summon Parliament after its prorogation on May 27, 2000, it refused to reverse that decision on the grounds that to do so would “create a legal and administrative nightmare.”¹³² That decision has been criticized, not least by another judge of the High Court, who felt that there was “a danger in allowing the doctrine of necessity to degenerate into a doctrine of convenience, a doctrine to avoid awkward or embarrassing situations.”¹³³ However, these actions show, as starkly as ever, that “the rule of law capacity of transitional societies cannot be expected to function at the same level as states that have a consolidated liberal juridical apparatus.”¹³⁴ It also perhaps demonstrates the practical limits of judicial activism in conflict-ridden societies where constitutionalism has but a tenuous hold.

¹³⁰ Shubha Singh, *Speight's Surprise*, FRONTLINE, Mar. 2-15, 2002 (quoting with approval *Fiji Times* editorial stating “Thanks to Speight’s guilty plea, the real truth [about the coup] will never be known.”), available at <http://www.flonnet.com/fl1905/19050560.htm>.

¹³¹ The Parliament was, as noted earlier, dissolved, and Prime Minister Chaudhary dismissed, by the President on 14 March 2001—actions which can be seen as smacking of political expediency.

¹³² *Rev. Akuila Yabaki & Ors. v. President of the Republic of the Fiji Islands & Anr.*, Civil Action No. HBC 119 of 2001S, Judgment dt. July 11, 2001, at p.17 (official transcript).

¹³³ *Jokapeci Koroi & Ors. v. Commissioner of Inland Revenue & Anr.*, Action No. HBC179/2001L, at 25.

¹³⁴ Ruti Teitel, *Transitional Justice Genealogy*, *supra* note 32, at 93.

That said, the gains have not been insignificant. The success of the restoration process in Fiji can be measured under a number of heads, and the picture which emerges is, on the whole, a positive one.

1. *Reinstatement of the Pre-Revolutionary Constitution and Constitutional Values.*

The sanctity of the 1997 Constitution has been firmly and unmistakably established. It has been acknowledged by both the politicians and the civil service. Fresh elections to Parliament have been held on the basis of its provisions and the power-sharing principles contained in the Constitution have been accepted by all sides, despite some initial quibbling over the precise mode of their application.

2. *Reinstatement of Functionaries to Their Old Offices.*

With the exception of the members of the Chaudhary Government and of the Parliament dissolved in March 2001 (many members of which were re-elected to that body in September 2001), almost all the functionaries who held public office prior to the coup have been returned to those offices. The military has retreated to its barracks and political and administrative power have been handed back to a civilian administration. Public watchdogs and oversight agencies, such as the Audit Commission, continue to perform their functions in much the same way as they did prior to the events of May 2000.

3. *Reparation for Tangible Material Losses.*

Although no large-scale scheme of compensation for those who suffered losses to their property in the aftermath of the coup has been put in place, there has been an official acknowledgement of these losses and some of those affected have been provided with state-funded rehabilitation assistance.

4. *Restoration of Law and Order and Strengthening of Democratic Institutions.*

The near-total breakdown of law and order, especially in the capital city of Suva, which followed the events of May 2000 has been reversed, and civilian life has been restored as nearly as possible to a state of pre-coup normality. The new government has signalled its intention to strengthen democracy and make the institutions of state responsive to the needs and aspirations of the Fijian people. Although ethnic rivalry and dissatisfaction among both the indigenous Fijians and Fijians of Indian descent over access to political power and economic resources still remains, a significant measure of communal harmony has been restored.

5. *Punishment for Those Responsible for the Coup:*

As noted above, George Speight and those involved in the seizure of Parliament and in hostage-taking were swiftly brought to trial. Speight himself remains in prison on a sentence of life imprisonment, while his accomplices were handed down sentences ranging from eighteen months to three years. There has been disquiet—both within the country and outside—over the perceived unwillingness of the Qarase Government's to investigate the role of some high-profile members of the Fijian elite in the planning of the coup, but a combination of domestic criticism and international pressure (notably from the Australian and New Zealand Governments) did result in the trial—and conviction—of a number of former dignitaries, including government ministers. The campaign to bring those responsible for the coup to justice continues, and it is likely that a few more prosecutions may follow.

B. *Factors Conducive to the Restoration Process*

Quite clearly, a number of factors have contributed to the relative success of the Fijian experiment in “restoration constitutionalism,” and it is necessary to understand these if any lessons are to be drawn for the future. Reference has already been made, at some length, to the extraordinary courage of the Fijian higher judiciary, without whose timely intervention the outcome of the events of May 2000 would have been radically different.

Second, it cannot be denied that the swiftness with which the law and order enforcement agencies in Fiji reacted to the derailment of democracy by Speight and his accomplices went some way in stemming the country's slide into irreversible lawlessness and anarchy. Although the Commander of the Fiji Military Forces did attempt to abrogate the Constitution, he drew back from that drastic step once the courts had signalled their disapproval of such action. It is to the credit of the Commander, too, that he readily submitted to the jurisdiction of the courts unlike military in other jurisdictions who have, in such circumstances, usually sought—and succeeded—in emasculating the judiciary.

The swiftness of the moves towards “normalisation” also meant that the damage caused to democratic institutions and processes was minimal and comparatively easier to repair. By contrast, the restoration of constitutionalism in other jurisdictions where it has been practiced, e.g. the countries of the former Soviet Union, has been a much harder and much longer-drawn out process.

Third, credit must also be given to the role played by the international community for Fiji's comparatively quick return to its pre-revolutionary state of liberal democracy. The sustained pressure that foreign governments, notably the Governments of Australia and New Zealand, exerted on the authorities—military and civilian—in Fiji to undo the effects of the May

2000 coup made a significant difference. That pressure continued well after the restoration of civilian rule, and was also responsible, to a significant degree, for ensuring that George Speight and others responsible for the coup were made to stand trial.

VI. CONCLUSION

The events in Fiji described above represent, however imperfectly, an instructive example of the “restoration” modality of transition wherein the country has been able to return, quickly and successfully, from a state of constitutional breakdown to a democratic *status quo ante*. The *status quo ante* in this case was the liberal settlement embodied in the 1997 Constitution. That Constitution, as well as containing strong human rights protection for all citizens, struck what most observers consider a fair balance between the rights, interests and aspirations of the two main population groups comprising this deeply divided nation.¹³⁵

The Fijian experience exemplifies what the authors of a recent article have called a “reassertion of law’s domestic and international legitimacy.”¹³⁶ It highlights the usefulness of even ordinary legal processes in delivering beneficial change within societies where the rule of law has suffered a serious setback. If “the success of the transition in a law-based state turns on a reversal of the kind of legal de-legitimation that occurred during the conflict,”¹³⁷ then the transition in Fiji, incomplete though it is in some respects, can still be characterized as largely successful. What is more, unlike the restoration constitutionalism that occurred in some of the post-communist states—a phenomenon which has been criticized for “offer[ing] dubious stability”¹³⁸—the return to the pre-revolutionary constitutional order in Fiji has been accompanied by a significant measure of legal and political stability.

¹³⁵ It is also, it might be added, a Constitution which had been adopted following a transparent democratic process which included extensive consultation with all sections of the Fijian population as well as thorough parliamentary scrutiny. See Quentin-Baxter, *supra* note 67, esp. at pp. 11-14.

¹³⁶ Christine Bell, Colm Campbell & Fionnuala Ni Aolain, *Justice Discourses in Transition*, 13:3 SOCIAL AND LEGAL STUDIES 305, 305 (2004).

¹³⁷ *Id.* at 312.

¹³⁸ TEITEL, *supra* note 7, at 206.